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No. 01-1326

IN THE

# Supreme Court of the United States

JAMES J. KRIVACSKA,

*Petitioner,*

*v.*

STATE OF NEW JERSEY,

*Respondent.*

ON PETITION FOR A WRIT OF CERTIORARI
TO THE SUPERIOR COURT OF NEW JERSEY,
APPELLATE DIVISION

## MOTION OF THE SCIENTISTS CONCERNED FOR RELIABILITY OF CHILDREN'S REPORTS, ACCUSATIONS AND TESTIMONY FOR LEAVE TO FILE BRIEF *AMICUS CURIAE* AND BRIEF *AMICUS CURIAE* IN SUPPORT OF PETITIONER

AMY GERSHENFELD DONNELLA
*Attorney for Amicus Curiae*
310 Chamounix Road
St. Davids, Pennsylvania 19087
(610) 341-9566

173263

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(800) 274-3321 • (800) 359-6859

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The undersigned *amicus* group, Scientists Concerned for Reliability of Children's Reports, Accusations and Testimony, hereby requests that this Court grant it permission to file a brief in support of the grant of certiorari in the above-captioned case. Petitioner has consented to the submission of a brief by the *amicus* group but the Respondent has refused its consent.

In support of its Motion, the *amicus* group shows this Court the following:

1. This *amicus* group is comprised of members of the academic research community and includes the many of the world's foremost experts in the field of suggestive interviewing of children. Each member of the group has participated firsthand in the development of research paradigms, the implementation of research projects, and the analysis of research results from studies designed to determine the effects of suggestive questioning on children. All of the members of this group have testified as experts and/or participated as *amici* in jurisdictions throughout the United States. The members of the *amicus* group are listed in the Appendix attached to the brief that accompanies this Motion.

2. The question presented for this Court's consideration is whether a state violates a defendant's rights to confrontation and to due process when it admits into evidence uncorroborated accusations of child sex abuse from children whose memories have been rendered unreliable by suggestive questioning. Despite Respondent's refusal to consent to the participation of this *amicus* group, the group is comprised of the very scientists who have conducted the research relied on by the state and defense experts who testified in this case about suggestive interviewing and its effects on children.

3. The writings and research results of members of the *amicus* group were misstated by the state's expert, and by New Jersey trial and appellate courts in this case. A fair resolution of the legal and policy issues raised in Mr. Krivacska's petition must ultimately rest on sound science and this *amicus* group is in the unique position of being able to provide this Court with the most accurate and up-to-date science that exists in this field.

4. The studies conducted by these researchers fall into three broad categories: (a) studies that examine the effect of suggestive questioning on children by mimicking the type of questioning to which children are often subjected in settings involving the criminal justice system; (b) studies that measure the ability of professionals accurately to judge whether children's reports are true or false, based on how credible the children appear to be when rendering these reports; and (c) studies to determine what linguistic markers and other objective factors, if any, distinguish reports of true events from reports of false events.

5. Although the research results of the *amicus* group are uncontroverted within the scientific community, this field has spawned many self-styled "experts," a number of whom are clinical psychologists and child welfare professionals, rather than research scientists. These "clinical experts" who testify in child sex abuse cases pay lipservice to the validity of the science but ultimately reject it in favor of their non-scientific clinical intuitions.

6. In the case at bar, consistent with the mandate of the New Jersey Supreme Court in *State v. Michaels*, 642 A.2d 1372 (NJ 1994), the trial court held a pretrial hearing to determine if the interviewing techniques that elicited reports of sexual abuse from the child complainants had the capacity to render the children's reports of abuse unreliable. If so, the

children's post-questioning reports would have to be excluded under *Michaels* in order to preserve Petitioner's right to confront the witnesses against him.

7. During this pretrial hearing, Dr. Kathryn Hall testified as a state expert about suggestive questioning and the suggestibility of children, citing often to research conducted by members of this *amicus* group, Drs. Stephen Ceci and Maggie Bruck. Using what she referred to as the "Ceci and Bruck model," Hall testified, consistent with valid scientific research, that children are highly suggestible, that the child complainants in this case were highly suggestible, and that the interviews to which these children were subjected were highly suggestive.

8. However, Hall departed entirely from the Ceci and Bruck model and from all other scientific literature when she then testified that there were ways by which *she* could tell from the children's reports that the children had not succumbed to suggestive questioning. Acknowledging that her conclusions were based entirely on her own clinical intuitions, Hall outlined a checklist of characteristics of the children's reports that prompted her to draw this conclusion.

9. Hall provided no scientific basis for her assertions. Nor could she have. Research has proved just the opposite: the objective markers Hall relied upon will not distinguish accurate reports from false reports of children whose memories have been tainted by suggestive questioning.

10. On the strength of the unsupported (and disproved) junk science propounded by Dr. Hall, the New Jersey trial court found the reports of abuse generated by suggestive questioning in this case reliable and admissible in court. The New Jersey Appellate Court upheld this finding.

11. The members of this *amicus* group believe it is critical for this Court to understand the research in this field in order for the Court to be able fully to assess why the question presented by the petitioner warrants consideration.

12. Accordingly, the undersigned *amicus* group asks the Court to give it the opportunity to submit the attached brief, which summarizes the most current research in the field of suggestive interviewing of children and which explains why the members of the group urge this Court to grant *certiorari*.

Respectfully submitted,

AMY GERSHENFELD DONNELLA
*Attorney for Amicus Curiae*
310 Chamounix Road
St. Davids, Pennsylvania 19087
(610) 341-9566

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At issue in the petition for *certiorari* submitted by Petitioner James Krivacska is the question of whether this Court should permit a defendant being tried on charges of child sex abuse to be convicted on the strength of unreliable evidence and unreliable science. In this case, Petitioner was convicted as a result of uncorroborated reports made by two children whose accounts of sex abuse were elicited during or after interviews that employed suggestive questioning techniques known to produce false and unreliable results. Petitioner's case is just one of many in which children's initial reports of abuse have been exacted through such questioning, rendering the accusations unreliable and the convictions that result therefrom, untrustworthy. Because the outcomes in this case and in a host of others rest on junk science and unreliable evidence, Scientists Concerned for Reliability of Children's Reports, Accusations and Testimony write in support of a grant of *certiorari*.[1]

## STATEMENT OF INTEREST OF THE AMICUS GROUP

This *amicus* group is comprised of many of the world's leading scientists and researchers in the field of the suggestive questioning of children. The members of the group and a brief description of their credentials are listed in Appendix A, attached hereto.

Each member of the group has participated firsthand in published peer-reviewed research designed to determine the effects of suggestive questioning of children. Each has also served as an expert witness to review the interviewing practices

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1. Neither party participated in the preparation or financing of this brief. Fees for the preparation and filing of this brief have been provided by Howard Margolis, Ed.D.; Abigail and Christian Kjeldsen; John Money, PhD, Emeritus Professor of Medical Psychology & Pediatrics; Philip A. Shaver, LLB; Marty Klein, PhD, Human Sexuality; Mary Katherine Hawryluk, PsyD; Laura Beider, PsyD; Marian C. Fish, PhD; Sandra L. Harris, PhD; Rev. Louis V. Schwebius, M.Ed, M.Div.; Peggy Brick, M.Ed; and Mark Koscinski, MBA, CPA, none of whom are members of the *amicus* group.

of investigators who interview children and/or to provide opinions to courts about their practices. Singly, and in combination with their colleagues, these experts have reviewed cases, testimony of other purported experts, and interviewing techniques employed in jurisdictions all across the United States — in state trial and appellate courts, and in federal habeas courts and United States Courts of Appeal.

As has been true in many cases from around the country, both the state and the defense experts in this case have identified the research and writing of the members of this *amicus* group as the authoritative sources of scientific literature in the field of suggestive questioning of children.

Thus, this Court has no more experienced or knowledgeable pool of experts to whom to look for guidance, nor any group as universally recognized for their authority in this area of science. Moreover, this *amicus* group has no political agenda, no economic stake in the outcome, nor any connection with Petitioner. They come to this Court for the sole purpose of ensuring that Petitioner, and others who are similarly accused, are not convicted by evidence that has been rendered unreliable through suggestive questioning nor by opinions rendered by "experts" that have no scientific support.

The members of the *amicus* group offer their collective knowledge to this Court because they are concerned that important law and policy issues are being decided in the courts on the basis, not of valid science, but of personal clinical intuitions that have already been disproved in carefully designed and controlled research studies. The *amicus* group is also concerned that courts regularly confuse the reliability of children's reports with the credibility of the child making the report.

Unfortunately, as research has amply demonstrated, there is no correlation between a child's credibility and the veridical content of a report that child provides following suggestive questioning. Nor are there discernible differences, such as

linguistic markers or other objective factors, with which one can distinguish a report of a true event from a report of a false event where the latter report results from suggestive questioning. And because the child who has been affected by suggestive questioning frequently comes to adopt as true the memories of false events, the child is impervious to cross-examination in court.

It, therefore, is critical in order to prevent the whole-scale abandonment of the rights of one accused of child sex abuse, that this Court demand that the state courts rigorously uphold two constitutional standards: First, that evidence that is untestable in the crucible of cross-examination be excluded from the jury's consideration as a violation of a defendant's right to confrontation; and second, that unreliable, unsupportable science be rejected by the courts as a violation of fundamental due process rights.

The *amicus* group addresses these issues in the following order. The first subsection below contains an overview of the research into suggestive questioning of children. Because the Petition for a Grant of *Certiorari* contains a list and description of the specific interviewing techniques shown to taint a child's memory, this *amicus* brief focuses on this issue of interviewer bias, the single factor most likely to result in suggestive questioning and, in turn, to generate false reports.

The second subsection addresses research findings that children who make false reports as a result of suggestive questioning are as credible in rendering these reports as are children reporting about true events. This subsection also addresses research that shows that the false reports themselves contain no characteristics that enable someone to distinguish them from reports of true events.

Interwoven through these first two subsections are responses to two specific assertions made by Respondent's "expert," Dr. Hall: (1) that these research findings have no bearing on reports of salient, personal physical experiences such as sexual

abuse; and (2) that Hall herself has ways, developed through her clinical insights, of determining that these two children's reports of abuse were not tainted by the suggestive interviewing to which they were subjected. The responses of the *amicus* group will demonstrate that Hall's clinical intuitions — the intuitions upon which the New Jersey state courts based their decisions — are unscientific by their nature, are unsupported by science, and had, in fact, been disproved by science.

In the final subsection, the *amicus* group discusses why these issues are of such great public importance as to warrant this Court's *certiorari* review.

***The Bias of an Interviewer Is Likely to Result in Suggestive Questioning and, In Turn, to Reports of Non-Experienced Events.***

In the past decade, there has been an exponential increase in research on the accuracy of children's recall of their past and on the factors that compromise the accuracy of their recall (Ceci & Bruck, 1993; Qin, Quas, Redlich & Goodman, 1997). In general, the results of this line of research indicate that although children's autobiographical recall is highly accurate for a wide range of events, their reports can be greatly distorted when they are obtained under suggestive interviewing conditions.

While early studies tested the distorting effects of a single leading question or single piece of misinformation, over the past ten years, the focus has shifted to studying the effects of suggestive interviews on the accuracy of children's reports. This shift was based on researchers' concerns that the largest suggestibility effects might be produced when children are confronted with a combination of implicit and explicit suggestive techniques that are woven into the fabric of the interview. Accordingly, studies were designed to look at the effects of interview techniques such as bribes, threats, and repetitions of questions (Ceci & Friedman, 2000). In this context, an interview is defined as a verbal interaction between at least

two participants where the goal is for one participant to obtain information from another participant. In this sense, interviews can be highly formal (*e.g.*, police interrogations), informal and unstructured (*e.g.*, a mother asking her child about school), or anything in between.

The concept of *interviewer bias* is a defining feature of suggestive interviews. (Bruck & Ceci, 2001). Interviewer bias characterizes those interviewers who hold *a priori* beliefs about the occurrence of certain events and who mold the interview to maximize disclosures that are consistent with those prior beliefs. One hallmark of interviewer bias is the single-minded attempt by an interviewer to gather only confirmatory evidence and to avoid all avenues that may produce disconfirmatory evidence. Thus, biased interviewers do not ask questions that might provide alternate explanations for the allegations or that might elicit information inconsistent with the interviewer's hypothesis. In addition, biased interviewers do not challenge the authenticity of a child's report when it is consistent with their hypothesis. Even when children provide inconsistent or bizarre evidence, it is either ignored or interpreted within the framework of the biased interviewer's initial belief. In contrast, when the child's statement is incongruent with what the biased interviewer believes, it will be challenged or pursued with repeated questions designed to align the child's subsequent reports with the interviewer's initial beliefs. Biased interviewers are not restricted to professionals who interview children; they can also include parents, teachers and others who have an agenda when they question children.

Interviewer bias has been shown repeatedly to influence the accuracy of children's reports (reviewed in Ceci & Bruck, 1995). In the typical study, children are asked by an interviewer to recall a staged event. This interviewer intentionally conveys a bias that is either consistent or inconsistent with what really occurred in the staged event. In these situations, children often make inaccurate reports that are consistent with the biased interviewer's scripts, biases, or beliefs (*e.g.*, Leichtman & Ceci,

1995; Lepore & Sesco, 1994; Thompson, Clarke-Stewart & Lepore, 1997). In contrast to their vulnerability to biased interviewers, children's reports are quite accurate when they are questioned by unbiased interviewers, even if they are occasionally asked leading questions, and even if they are questioned after long intervals following the event (*e.g.*, Goodman & Aman, 1990; Rudy & Goodman, 1991).

Interviewer bias is reflected through a number of suggestive techniques that influence the entire architecture of interviews. As interview bias increases, so does the number of suggestive techniques, and this in turn decreases the accuracy of children's reports.

In order to obtain confirmation of their suspicions, biased interviewers may not ask children "open-ended" questions such as, "What happened?" but instead resort to a barrage of specific questions that contain information about the interviewers' hunches. This strategy is problematic because children's responses to specific questions are less accurate than their responses to open-ended questions. This finding has been consistently reported since the beginning of the 19th century (for review see Ceci & Bruck, 1993), and is highlighted in a compelling study in which Peterson and Bell (1996) interviewed children about a traumatic injury after an emergency room visit. These researchers found that children were most likely to accurately report the important details in response to open-ended questions; however, their accuracy decreased substantially when they were asked more specific questions (*e.g.*, "Where did you hurt yourself?" or "Did you hurt your knee?"). Specific questions, which have the greatest risk of decreasing children's accuracy, include "yes-no" questions (Was it black?) as well as forced choice questions (Was it black or white?) (*See* Brady, Poole, Warren & Jones, 1999; Walker, Lunning, & Eilts, 1996). Peterson and Grant (2001) concluded that yes-no questions are the most problematic because children have a bias to produce "yes" answers and rarely produce "I don't know" responses to these questions. This pattern reflects children's efforts to provide

answers consistent with what they see as the intent of the questioner rather than consistent with their knowledge of the event (Ceci & Bruck, 1995, for a review).

When biased interviewers receive answers that do not confirm their pet hypothesis, they repeat their questions, hoping for a more consistent answer. And many children will change their answers upon being asked a repeated question. Researchers believe that the reason for this change is that the children assume their first answer was incorrect, hence the need to repeat the question.

Some interviewers convey their bias by providing information about the alleged target events that the child has not yet supplied (*e.g.*, "Jason told me you were there when your stepfather hit your sister."), resulting in unreliable responses, particularly after multiple interviews. For example, 5-year old children received an inoculation from a pediatrician and one year later were interviewed four times about the details of that visit (Bruck, Ceci, Francoeur, & Barr, 1995). Children who were repeatedly interviewed in a neutral, nonleading manner provided accurate reports about the original medical visit, displaying high levels of accuracy after a year long delay. In contrast, children who were repeatedly given misinformation about the salient details associated with the medical visit incorporated the misinformation into their reports (*e.g.*, they made false claims that the inoculation was administered by a female research assistant rather than the male pediatrician).

Interviewer bias may also be reflected by the "atmosphere" of an interview. Sometimes, interviewers provide much encouragement during the interview in order to put children at ease by providing a supportive environment. Children's resistance to misleading questions increases when they are questioned by warm, supportive, and neutral interviewers (*e.g.*, Carter, Bottom & Levine, 1996). However, encouraging statements lose their impartial tone when there is selective encouragement (reinforcement) for statements that are consistent

with the interviewer's beliefs. For example, Garven, Wood and Malpass (2000) asked children yes/no questions about a special person who had visited their class one week earlier. Children who were given positive feedback for following the interviewer's lead (*e.g.*, "Great") and negative feedback for not following the lead ("You're not doing well") inaccurately assented to over 40% of the misleading questions. In contrast, children who were asked the same questions with no feedback only provided inaccurate responses for 14% of the questions.

Peer pressure is another suggestive technique used by some biased interviewers who try to obtain the child's cooperation by telling the child that his friends have helped or already told, and that he should also tell, and/or that he will feel better once he has told. Research dating as far back as 1900 show that children can be swayed to give incorrect information about an experienced event if they are provided with inaccurate information about how other witnesses have responded. Binet (1900) found that children will provide the incorrect answer of the rest of the group rather than give their own perception of reality. This effect is particularly pronounced when the peer pressure is used in combination with other suggestive questioning techniques.

Sometimes police or social service officials with high status use some of these suggestive techniques alone or in combination (Lamb, *et al.*, 1996). One of the difficulties in this situation is the fact that children are much more likely to follow the suggestions and leads of an interviewer who has high status (and thus presumed credibility) (*e.g.*, Lampinen & Smith, 1995; Templeton & Hunt, 1997; Tobey & Goodman, 1992). In the eyes of a child, even an unfamiliar interviewer who professes knowledge about a target situation is accorded special status (*e.g.*, Ceci, Ross, & Toglia, 1987; Hembrooke, Toglia & Ross, 1991).

Guided imagery is another potentially suggestive interviewing technique. Interviewers sometimes ask children

to try to remember or pretend if a certain event occurred, to create a mental picture of the event and to think about its details, or to speculate about an event ("Well, how do you think you would have felt if you did remember it happening to you?"). Under these circumstances, children may later come to report and believe these imagined activities actually occurred. This is because they sometimes do not distinguish memories of actual events from memories of imagined events (*e.g.*, Lindsay, Johnson, & Kwon, 1991; Parker, 1995; Welch-Ross, 1995). This hypothesis is supported by studies where young children were repeatedly asked to think about real as well as imaginary events, creating mental images each time they did so (*e.g.*, Ceci, Crotteau-Huffman, Smith & Loftus, 1994a; Ceci, Loftus, Leichtman, & Bruck, 1994b). In one study, children's assent rate to false events increased over ten sessions. Moreover, even when the children were told that the imagined events had not happened, many continued to confirm their false statements, insisting that they really occurred (Ceci, *et al.*, 1994b). These data suggest that some children believed that they had experienced the imagined fictitious events.

Although the use of a single suggestive technique can result in inaccurate reports, error rates can be low (*e.g.*, Rudy & Goodman, 1991). More robust suggestibility effects are obtained when two or more suggestive techniques are combined in one interview, as they often are in real life interviews such as the ones conducted in Petitioner's case. For example, Garven, *et al.* (1997) interviewed children one week after a stranger visited their daycare. Half of the children were asked leading questions. The other children were also asked leading questions but in combination with other suggestive techniques including peer pressure ("The other kids said that . . ."), positive consequences (praising certain answers), negative consequences (telling the child that this was not the appropriate answer, and repeating the question), enjoinders to think about questions to which they had replied "no," and enjoinders to speculate (tell what might have happened). Children in the combined suggestion condition

accurately answered only 42% of the questions compared to an accuracy rate of 83% for children who were just asked leading questions. (Of course, it is worth remembering in the context of a criminal investigation that even an accuracy rate of 83% can be highly problematic.)

One might wonder whether young children's suggestibility-proneness is restricted to non-sexual matters that are largely peripheral and non-salient.[2] However, research amply demonstrates that children are not merely suggestible about peripheral details but also about central details that may involve their bodies (Ceci & Friedman, 2000). At times, children's false reports can be tinged with sexual connotations. In laboratory studies, young children have made false claims about "silly events" that involved body contact (*e.g.*, Did the nurse lick your knee? Did she blow in your ear?), and these false claims often persisted in subsequent interviews over a 3-month period (Ornstein, Gordon, & Larus, 1992). Preschoolers assented to suggestions that a doctor had cut out some bone in the center of the child's nose to stop the child from bleeding (Quas, *et al.*, 1999). Children have falsely reported that a man put something "yucky in their mouth" (Poole & Lindsay, 1995, 2001), that their pediatrician had inserted a finger or a stick into their genitals (Bruck, Ceci, Francoueur & Renick, 1995), and that a man touched their friends, kissed their friends on the lips, and removed some of the children's clothes (Lepore & Sesco, 1994). Children have also falsely reported that someone touched their private parts, kissed them and hugged them (Bruck, Melnyk &

2. On direct examination, the state's expert in Petitioner's case, Kathryn Hall, adopted the Ceci and Bruck model for analyzing the suggestiveness of the interviews to which the child complainants were subjected in this case and deemed the interviews highly suggestive. On cross-examination, Hall suddenly expressed skepticism about the validity of the Ceci and Bruck model on the grounds that their research could not necessarily be generalized to situations that involved sexual matters or that were salient or central to their physical being. The studies described above, however, demonstrate that such skepticism was misguided.

Ceci, 2000; Rawls, 1996; Goodman, Bottoms, Schwartz, Kenney & Rudy, 1991).

Suggestive interviews have also been shown to influence children's reports about emotionally charged or central events. *See* Ceci, *et al.*, 1994b.

***Research Has Demonstrated that Children's False Reports Appear Credible to Adults, Even those Who Are Trained Professionals.***

Another matter that has been tested and written about extensively in the suggestibility literature is whether children's false reports (i.e., those elicited through suggestive techniques) appear credible to adults and, specifically, to trained professionals. In some studies, trained professionals (*e.g.*, judges, mental health workers, and lawyers) viewed videotaped or transcribed segments of interviews with children, some of whom had succumbed to interviewers' erroneous suggestions, and some of whom had not.

In one such large-scale study, children in a pre-school class were told stories every day for a month about a clumsy man named Sam Stone. At the end of the month, Sam (a confederate) came to their classroom. He walked into the classroom, said hello, walked around the classroom, said goodbye and then exited. He did nothing else. The day after Sam Stone's visit, the children were shown a ripped book (the same one they were reading when Sam came to visit) and a soiled teddy bear (that had not been in the room during the visit.) The children were asked if they knew how the book had gotten ripped or how the teddy bear had gotten dirty. Thereafter, the children in the test condition were given four suggestive interviews over a period of ten weeks. Each suggestive interview contained two erroneous suggestions, one having to do with the ripped book and one having to do with the soiled teddy bear. Finally, one month later, a new interviewer questioned the children about Sam Stone's visit. The new interviewer began by saying, "I wasn't there the day that Sam came to visit your classroom. Can you tell me

what happened?" The interviewer then asked, "Did anything happen to a book? Did anything happen to a teddy bear?"

A significant percentage of children insisted, even after being gently challenged, that they had seen Sam Stone rip the book and do something to soil the bear. The most surprising result was that these children's reports were full of false perceptual details, as well as nonverbal gestures, all provided to embellish their stories of the non-events. For example, children used their hands to show how Sam had thrown the bear into the air; some children reported having seen Sam on the playground, on his way to the store to buy ice cream or in the bathroom, soaking it in water before smearing it with a crayon.

These final interviews were videotaped and three of them were shown to 119 researchers and clinicians ("judges") who worked in the area of children's testimonial issues to see if these professionals could discriminate between the erroneous and the accurate reports. The three interviews they were shown were: Child 1, who spontaneously gave a very elaborate account of Sam coming into the classroom and tossing a doll into the air, ripping a book, and soiling the teddy bear; Child 2, who was soft-spoken and said that Sam only came into the classroom to say hello and left without doing anything wrong; and Child 3, who first said Sam had only come in and looked around, but who, with some prompting, asserted elaborately and with conviction that Sam had ripped one page of the book and painted ice cream over a teddy bear. The judges were told simply that the three children had been present when a man visited their classroom and that all had witnessed the same visit.

Immediately after viewing all three tapes, the judges were asked to rate the accuracy of particular statements made by the children on a 7-point scale, ranging from "very confident that the event did not occur," to "very confident that the event did occur." In this study with these 119 judges and in subsequent studies that used a total of 2300 professionals as judges,

Child 2 — who was the most accurate — was consistently rated as the least believable, while Child 1 — who was the least accurate — was consistently rated as the most believable.

In another study, children's parents were interviewed to find out about events that transpired at various times in their children's lives (*e.g.*, moving, birth of younger siblings, vacation trips; birthday parties; death of pets; injuries requiring stitches.) Children were then interviewed individually, and provided with a list of both real and fictitious (experimenter-contrived) events. (The fictitious events were discussed with parents to ensure that the child had never experienced them, such as riding with classmates in a hot air balloon and getting one's hand caught in a mousetrap and having to get it removed at the hospital.) The interviewer held index cards on which the real and fictitious events were written and informed the child:

> I am going to read some things that may have happened to you, and I want you to think real hard about each one of them that I am going to read. Try to remember if it really happened. We made this list up by talking to your mother and father to get them to tell us about things that really happened to you when you were younger, but not all of the things I am going to read to you really happened.

Children were asked to try to recollect the events on 7-10 separate occasions, spaced on average 7-10 days apart. Ninety-six children completed at least seven sessions. Fully a third of them assented to false events by the end of the study.

As in the Sam Stone study, the final videotaped narratives in this study ("Mousetrap 1") reveal richly detailed, but false, claims. In part, the children seem so convincing because they insert affect at the appropriate points, they include low frequency details, and they make spontaneous corrections to their stories.

The researchers then selected five fictitious events that were reported by the children at their final videotaped interview, along

with 5 real events from the final interview. The researchers showed these videotapes to 109 professionals in psychology, law enforcement, social work, and psychiatry to see if they could determine which events had actually been experienced by the children and which had been fictitious. The 109 judges were asked to rate on a scale their opinions as to whether each event being recounted was true or false. The judges were not told how many of the events were true or false, only that there were some of each.

These professionals were terrible judges of the truth or falsity of the narratives. As many professionals were reliably *worse* than chance at detecting which events were real or fictitious as the number who were at chance and above chance. Similar results have been obtained in subsequent studies of the same nature. (Ceci, Loftus,, *et al.*, 1994)

In a very recent study, 251 undergraduate students watched videotapes of 10 children who were interviewed about an experience with a baby sitter that had happened one year previously. The children were asked for a free narrative. The children were then asked four leading questions and four misleading questions. The children were also asked to select the baby sitter from a photo array. At the end of their interview, the children rated their own confidence in the accuracy of their statements. After viewing the videotapes, the undergraduates were asked to rate both the accuracy of each child and their perception of each child's confidence.

Two major findings emerged from this study. First, there was no relationship between the child's accuracy and the judges' ratings of the child's accuracy. Second, the judges' ratings of the child's accuracy did correlate with ratings of the child's confidence. (Bottoms, Rucknick & Nysse-Carris, 2002).

Related research has shown that professionals do not agree about the credibility of children's claims of abuse even when they were provided with extensive case material (Horner, Guyer & Kalter, 1993).

***There Are No Objective Markers that Distinguish False From True Reports.***

All of the above findings about children's credibility were based on the professionals' subjective impressions. In a very recent study, however, researchers asked if similar results would be obtained with more objective measures. (Bruck, Ceci, Hembrooke, in press). Thus, researchers took both true and false reports that followed scripted suggestive interviews and carefully counted and scored various linguistic markers that some psychologists have asserted provide reliable indicators of the truth or falsity of a child's narrative. This study was highly controlled so that the children providing the narratives were asked not just about true events that had occurred in their lives, but staged true events, so that the researchers would know exactly what had transpired with these children. As in earlier studies, researchers confirmed with parents that the false, suggested events had never been experienced by the children. (The two false events were that the child had helped a woman find her monkey, which had escaped at the school, and that a thief had come into the school and stolen food from the kitchen before escaping down the stairs.)

Generally, the tabulated linguistic markers did not correlate with the accuracy or falsity of the narrative given by these children after they had been subjected to suggestive interviews. Thus, contrary to the assertions of child care professionals who believe they can accurately assess true from false statements based on objective linguistic features of the narratives, no such objective features consistently characterize true or false statements.

Another experiment tested the hypothesis that a child who accepts some suggestions will predictably accept all suggestions. In this study, the children were asked suggestively about two false events, reported to have occurred when they were four years old. One event was chosen because of its plausibility (being lost in a shopping mall), while the other was chosen because of

its implausibility (the child receiving a rectal enema.) While the majority of children did not recall either event, a significant number of the children "recalled" the plausible event but not the implausible event. The importance of this study is that it demonstrates that a child who accepts some suggestions may nevertheless persistently reject other suggestions. (Pezdek, *et al.*, 1999).

In summary, assent rates, denial rates, and consistency of children's reports once they have been subjected to suggestive questioning provide no basis for systematically distinguishing between children's reports of true events from children's reports of events that never happened at all. (*See also* Brady, *et al.*, 1999 in which consistency and answers to suggestibility check questions were not predictive of performance.)[3]

***The Assertions of the State's Expert in the Case at Bar Typify the Misinformation and Bad Science Being Accepted by the Courts, Resulting in Convictions Based on Unreliable Reports of Abuse and Unreliable Science.***

In the case at bar, the state's expert, Dr. Kathryn Hall, acknowledged that the two child complainants had been subjected to highly suggestive interviews. She reached this conclusion, according to her own testimony, by examining the interviews in light of the Ceci and Bruck model. (Drs. Ceci and Bruck are two of the signatories to this brief.) Hall then asserted, nevertheless, that she could tell, based on her clinical intuitions, that the two child complainants had not succumbed to the suggestive questioning. She based her opinion on a checklist of factors that consisted of: the consistency of the children's reports

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3. These research results directly contradict the assertions made by Kathryn Hall that she could tell that the children in this case were telling the truth because they consistently denied that they had performed fellatio on the defendant, despite such suggestions having been made to them by interviewers.

once the interviewing process had begun[4]; the fact that the children supplied details that had not been specifically suggested to them; the fact that the children denied having any form of oral sex with the Petitioner, despite such events having been suggested to them; and the fact that the children corrected "erroneous" statements made to them.

The decision of the New Jersey Appellate Division accepted this line of reasoning as valid, despite its lack of scientific support. (Hall herself acknowledged that her opinions were based solely on her clinical intuitions and that she had no scientific support for them.) Thus, the problem here was two-fold – 1) that the state expert provided testimony that was totally erroneous, which led the trial court to admit statements by the child complainants that lacked any basis of reliability, and 2) that the state courts adopted unsupported, disproven clinical intuitions over valid, research-supported science. As a result, Petitioner was convicted on the basis of unreliable evidence, admitted on the basis of unreliable science.

This problem arises with regularity in child sex abuse litigation.[5] There is no lack of people who have a great deal of experience as clinicians and who testify that their clinical intuitions are superior to, and should trump, the extensive peer-reviewed controlled scientific research in this field.

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4. Hall also attributes her reliance on consistency of reports to the Ceci and Bruck model. Her reliance reflects a serious misunderstanding of their writings. The consistency that they deem noteworthy is consistency of reports of abuse made from *before* the time the suggestive interviewing began, not the consistency of reports that emerges after the child has been subjected to suggestive questioning. As in the legal analysis of reports made by a witness subjected to hypnosis, the pre-hypnosis reports are considered reliable and may continue to be deemed reliable even if they are also made during hypnotic sessions.

5. This is not to suggest that this problem is present in all child sex abuse cases but that neither is this case unique. As noted earlier, each of the signatories to this brief has been involved in one or more cases, in jurisdictions throughout the United States, where these issues have arisen.

At the same time, many courts seem to lack direction on how to evaluate science. These courts also lack an adequate understanding of the distinction between the reliability of children's reports and the credibility of the child while making that report. The testimony of the clinicians only helps to blur these distinctions.

As a result, many courts wind up focusing their assessments of reliability on the content of the child's report, rather than on the methods that produced the child's report in the first place. Unfortunately, because there is no element of a child's report that will identify whether it is true or false once the child has been subjected to suggestive questioning, using that report as the defining factor can only result in the admission of unreliable evidence.

Accordingly, the focus of the court's inquiry must begin with, and remain with, the type of questioning to which the child was subjected before making accusations of abuse.

***The Issue Presented to this Court For Certiorari Review is One of Significant Public Importance, Requiring a Determination by this Court, to Provide Direction to Trial Courts Throughout the United States.***

Child sex abuse prosecutions engender more publicity, more anger, and more societal protectiveness than perhaps any other form of criminal litigation. With good reason, no one wants children to be victimized by sexual predators.

The prosecution of these cases can be difficult. There are rarely eyewitnesses to acts of sex abuse. There is rarely physical evidence of the abuse. The case often rests on the accusations of a child.

At the same time, charges of child sex abuse are among the most difficult to defend against. There is simply no way to prove it did not happen. Just as the lack of physical evidence makes these cases difficult to prove, the fact that sexual abuse can be committed without leaving any physical evidence means that the absence of such evidence is rarely considered an exonerating factor.

This case, and others like it around the country, present a real challenge to the strength of the commitment of the courts to protect the constitutional rights of defendants to confront the witnesses against them and to be tried and convicted only by reliable evidence, even when the alleged victims are children. Because of the natural impulse to want to protect vulnerable victims, the response of some judges has been to err in favor of the children by relying on unscientific principles and by allowing unreliable evidence to be considered by juries. This response, however well-intentioned, flies in the face of constitutional safeguards that have previously been articulated by this Court.[6] If protections granted to defendants by the Constitution are to be relaxed or recast in child sex abuse cases, such a decision should come only at the direction of the United States Supreme Court and only after careful and deliberate consideration. These decisions should not be made in the haphazard and inconsistent fashion they are currently being rendered in trial courts across the country.

And the underpinning for any decision made by this Court ought to be sound science and valid research, conducted in controlled settings and available for scholarly review and critique. It should not rest on the private clinical intuitions or observations of an individual practitioner or idiosyncratic theories that have neither been tested nor examined in the glare of peer review.

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6. *Idaho v. Wright*, 497 U.S. 805, 110 S. Ct. 3139 (1990); *Ohio v. Roberts*, 448 U.S. 55, 66, 100 S. Ct. 2539 (1980); *Manson v. Brathwaite*, 432 U.S. 98, 97 S. Ct. 2243 (1976); *Lee v. Illinois*, 476 U.S. 530, 106 S. Ct. 2056 (1986); *Neil v. Biggers*, 409 U.S. 188, 196-197, 87 S. Ct. 1967 (1967); *United States v. Wade*, 388 U.S. 218, 87 S. Ct. 1926 (1967); *Stovall v. Denno*, 388 U.S. 293, 87 S. Ct. 1967 (1967); *Foster v. California*, 394 U.S. 440, 89 S. Ct. 1127 (1969); *White v. Illinois*, 502 U.S. 346, 112 S. Ct. 736 (1992); *Rock v. Arkansas*, 483 U.S. 44, 107 S. Ct. 2704 (1987).

## CONCLUSION

For the foregoing reasons, Scientists Concerned for Reliability of Children's Reports, Accusations and Testimony believe that this Court should consider the question presented in Mr. Krivacska's petition for *certiorari* review so that this issue can be decided finally and uniformly as this Court has previously addressed issues concerning suggestive photo identifications, suggestive line-ups, and the use of hypnosis on state witnesses. This *amicus* group asks this Court to speak again on the need to base convictions on reliable research and reliable evidence. The alternative is for our courts to be governed by the tyranny of disproven intuition and junk science.

Respectfully submitted,

AMY GERSHENFELD DONNELLA
*Attorney for Amicus Curiae*
310 Chamounix Road
St. Davids, Pennsylvania 19087
(610) 341-9566